No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court Central District of California.

APPELLANT'S REPLY BRIEF TO BRIEF FOR APPELLEES THE JAMES IRVINE FOUNDATION, ET AL

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The James Irvine Foundation and the individual defendants who are joined in plaintiff's action as directors, members and trustees of said corporation, will all be referred to in appellant's reply brief as the "defendant Foundation".

THE ATTACK ON PLAINTIFF

The bad manners displayed by the defendant Foundation in making a scurrilous attack on the integrity of the plaintiff for bringing her action in this case amounts to nothing more than a desperation defense by said defendant because of its total failure to meet the basic issues

involved in this appeal or to cite a single case which applies to the facts disclosed by the record in the plaintiff's case. By their carping false statements concerning the plaintiff's good faith in bringing this action said defendant's objective is to prejudice the judges of the Court of Appeals against the plaintiff and the merits of the plaintiff's case through its attempt to slur the good name of the plaintiff by a distortion of her activities during the past ten years as the largest individual stockholder in The Irvine Company and as the only director of said corporation who is a stockholder thereof.

It is true that the plaintiff has been compelled to be constantly on guard against the self-dealing activities of the defendant N. Loyall McLaren, the president of The James Irvine Foundation and said defendant's chairman of the board of directors of The Irvine Company and its chief executive officer. A short summary of a few of the background problems which have confronted the plaintiff during said ten-year period and which were responsible for the plaintiff's acts to protect her substantial financial interest in The Irvine Company, is as follows:

In 1951 Mr. McLaren, who was the tax advisor for the minor guardianship estate of plaintiff and therefore the plaintiff's trustee who stood in a confidential relationship to the plaintiff, overreached his position as said trustee and fraudulently and unjustly enriched himself from the guardianship estate of plaintiff by charging the guardianship estate the sum of $10,405 for alleged services that he never rendered. Mr. N. Loyall McLaren represented to the guardian of the plaintiff's guardianship estate that he had been elected to the board of directors of The Irvine Company at the request of plaintiff's mother, who was her guardian, following the death of James Irvine on August 24, 1947, for the sole purpose of

protecting the plaintiff's interest as a stockholder in The Irvine Company. This representation by Mr. McLaren was fraudulent, false and untrue. The minutes of the special meeting of the board of directors of The James Irvine Foundation held on September 19, 1947, immediately following the death of James Irvine, disclose that a resolution was adopted which appointed the said Mr. McLaren as the nominee of said defendant Foundation to be a Foundation director of The Irvine Company. (Ex. A-14) Pursuant to this resolution Mr. McLaren attended the meeting of the board of directors of The Irvine Company on October 15, 1947 as such nominee-director. (Ex. 2) When the bylaws of said Irvine Company had been amended, which increased the directors from five to seven, Mr. McLaren immediately became the director for the defendant Foundation on the board of directors of The Irvine Company. Instead of protecting the financial interest of the plaintiff as a substantial stockholder in the said Irvine Company, Mr. McLaren served on said board of directors solely in the interest of The James Irvine Foundation which at all times was adverse to the best interests of the plaintiff. At said directors' meeting Mr. McLaren was present and approved a loan in the amount of $180,000 to Brad Hellis and an associate of Mr. Hellis. Mr. Hellis was vice president and general manager and a director of The Irvine Company. This loan was based solely upon the false statement by Mr. Hellis that Mr. Irvine, before his "accidental" death which occurred under mysterious circumstances while Mr. Hellis was on a fishing trip to Montana with Mr. Irvine, had verbally promised Mr. Hellis that The Irvine Company would make him said loan in the amount of $180,000. No writing of any kind or corroboration was presented to said board of directors to support the said false representation of Mr. Hellis, and no inquiry whatever was made by Mr. McLaren with

reference to the facts and circumstances connected with said alleged verbal promise of Mr. Irvine. Said loan of $180,000 was used by Mr. Hellis in various self-dealing land transactions in which The Irvine Company participated with Mr. Hellis with the approval of Mr. McLaren. As a result of said loan and further financing provided by The Irvine Company, the said Mr. Hellis, during the time that he was the vice president, general manager and a director of The Irvine Company, unjustly enriched himself contrary to the law that was applicable to the fiduciary obligations of an officer and director of a corporation toward the stockholders of said corporation. The plaintiff did not learn of the various illegal activities of Mr. McLaren as said director of The Irvine Company until plaintiff became a director of said corporation in 1957. The following facts disclose a close relationship between Mr. McLaren and Mr. Hellis during the period 1947 to 1957. On May 17, 1950 Paul A. Dinsmore, who had been an employee of James Irvine during the lifetime of Mr. Irvine, was required to resign as a member, director and a vice president of the Irvine Foundation by Mr. McLaren, and Mr. Hellis was thereupon elected a director and member of the Irvine Foundation in the place of Mr. Dinsmore, and Mr. McLaren was elected vice president of the defendant Irvine Foundation in the place of Mr. Dinsmore. (Ex. A-14) Mr. Dinsmore was selected by his employer James Irvine to be not only an original member and director of the defendant Foundation, but also as the first vice president thereof. The removal of Mr. Dinsmore after the death of James Irvine is typical of the illegal activities of Mr. McLaren which are referred to by the plaintiff.

The first legal action taken by plaintiff which is referred to by said defendant Foundation as a serious effort by the plaintiff to "disrupt and discredit the

management" of The Irvine Company, which means the management of Mr. McLaren, involved the self-dealing activities of Mr. Hellis as an officer and director of The Irvine Company by reason of which he had unjustly and substantially enriched himself. The plaintiff was required to employ attorneys who made a thorough investigation of said illegal activities of Mr. Hellis and as a result thereof Mr. Hellis was required to resign as vice president, general manager and director of The Irvine Company, and also to resign as a director and member of The James Irvine Foundation, and there was also a forced settlement of the illegal joint land ownership interests between Mr. Hellis and The Irvine Company and the payment of a substantial sum of money by Mr. Hellis. It therefore appears that the assertion by the defendant Foundation that all of the legal actions of the plaintiff have been unsuccessful, is not true.

Myford Irvine, the president of The Irvine Company, committed suicide on January 11, 1959, after having finally realized that he had been used by Mr. McLaren as a party to the illegal activities of Mr. McLaren that were connected with the invalid 1937 indenture of trust, which had resulted in the disinheritance of himself and the other heirs of James Irvine from a very substantial part of the Estate of James Irvine, to wit, 510 shares of Irvine Company stock, all of which had caused him great financial stress and mental anguish. Tr. 2292-2298, incl.

Following the death of Myford Irvine, the James Irvine Foundation technically, but actually Mr. McLaren, took over control of The Irvine Company, lock, stock and barrel. Mr. McFadden, who was a member and director of The James Irvine Foundation, who was selected by Mr. McLaren, became the vicarious president of The Irvine Company, and Mr. McLaren elected himself as vice president of said corporation. Immediately there-

after Mr. McLaren brought out a friend from New York by the name of Roger Stevens for the purpose of promoting a new corporation which would take over the substantial assets of The Irvine Company. Mr. McLaren was to be an active participant and a stockholder in said new corporation which was to be called The Stevens Development Co. The plaintiff was again required to threaten legal action against the Irvine Foundation, The Irvine Company, Mr. McLaren and Mr. Stevens in order to protect her financial interest in The Irvine Company, and was once more required to employ attorneys to resist the illegal activities of Mr. McLaren. The Stevens Development Co. promotion was abandoned by Mr. McLaren when the plaintiff threatened that she would institute legal proceedings in the State of West Virginia where the Irvine Company was incorporated for the purpose of liquidating said corporation. Again plaintiff's threat of legal action was successful.

Because of the obvious illegal activities of Mr. McLaren and the other directors of The Irvine Company who were elected and controlled by the Irvine Foundation, the plaintiff instituted legal proceedings which would permit the plaintiff to have her attorney present at the meetings of the board of directors of The Irvine Company. Plaintiff was unsuccessful in this action upon the ruling of the court that under the laws of the State of West Virginia the board of directors of a West Virginia corporation had the exclusive right to determine who would be invited to attend the meetings of the board of directors.

The Board of Regents of the University of California indicated it was considering the establishment of a university on a site that was located on the land of The Irvine Company. The plaintiff insisted that The Irvine Company make a gift of said land to the said Board of Regents. Instead of joining with the plaintiff, Mr.

McLaren and the other directors of The Irvine Company who represented the Irvine Foundation immediately made a sale of the land which had been selected by said Board of Regents to a cemetery promotion corporation. Thereafter the plaintiff demanded that another location on the Irvine property be made available to the said Board of Regents. Mr. McLaren, Mr. McFadden and the other Foundation directors of The Irvine Company refused the plaintiff their cooperation and took the position that in any negotiations with the Board of Regents, said negotiations would have to be based upon a sale of said land, and not as a gift. Again, after much delay and opposition on the part of Mr. McLaren and his Foundation directors, the plaintiff prevailed and once more her efforts were not unsuccessful. Solely through the activities of the plaintiff the Board of Regents of the University of California received a gift from The Irvine Company of 1000 acres of land that is situated in Orange County and on which there stands today the University of California at Irvine.

Reference is made in the brief of defendant Foundation to the case of plaintiff and her mother Athalie R. Clarke against The James Irvine Foundation, et al, reported in 47 Cal.Rptr. 392. The facts disclosed in the opinion of the District Court of Appeal in this case covered a series of illegal self-dealing transactions that were carried on by one Long, who was a director and vice president of The Irvine Company, together with Mr. McLaren and Mr. McFadden that involved the property of The Irvine Company. Although said stockholder derivative action in accordance with the law named as defendants The James Irvine Foundation, The Irvine Company and all of the directors of each of said corporations, the principal defendants therein were Mr. Long, Mr. McLaren and Mr. McFadden. This litigation involved another activity of said principal defendants to unjustly enrich

themselves in violation of their fiduciary obligations to the stockholders of The Irvine Company, and contrary to the claim of said defendant Foundation, plaintiff's action was not unsuccessful. A demurrer was sustained to plaintiff's complaint but an appeal was taken and the judgment of the lower court was reversed as to said principal defendants Long, McLaren and McFadden. Pending the appeal in said case the principal witness for the plaintiff died and further proceedings by the plaintiff were thereby frustrated and she was compelled to dismiss said action.

The foregoing abridged summary of the background facts involving a few of the illegal activities of Mr. McLaren and with which the plaintiff has been confronted during the past ten years presents the true story of said plaintiff's actions and for which she has been villified by the defendant Foundation in its brief. (Tr. 234-257, incl. Testimony of Mr. N. L. McLaren; Tr. 2220-2368, incl. Testimony of Mrs. Athalie Irvine Smith; Tr. 1743-1781, incl. Testimony of Mr. Friedman).

THE DEFENDANT FOUNDATION WAS THE ALTER EGO OF JAMES IRVINE

The fatal error which permeates the entire brief of the defendant Foundation is based upon the unfounded assumption that the defendant Foundation, as the alleged trustee named in the indenture of trust, was a real bona fide trustee entity and not merely a shell and the shadow and the alter ego of James Irvine. The substantial evidence discloses that not only was the defendant Foundation the alter ego of James Irvine but, furthermore, Myford Irvine, as president of the defendant Foundation, and E. M. Price, as secretary thereof, served in each of said capacities as the servants and employees of their master James Irvine.

The alter ego or one-man corporation where the corporate entity is disregarded is a corporation that is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality, agency, conduit, or adjunct of one individual. See the following cases:

Engineering Service Corp. v. Longridge Invest. Co., 314 P.2d 563, 153 C.A.2d 464

Erkenbrecher v. Grant, 200 P.641, 187 C.7

Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 C.2d 514

Kohn v. Kohn, 214 P.2d 71, 95 C.A.2d 708

McLaughlin v. L. Bloom & Sons Co., 24 Cal.Rptr. 311, 206 C.A.2d 848

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Minton v. Cavaney, 15 Cal.Rptr. 642, 56 C.2d 576

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Shafford v. Otto Sales Co., Inc., 308 P.2d 428, 119 C.A.2d 349

Sweet v. Watson's Nursery, et al, 92 P.2d 812, 23 C.A.2d 379

Wilson v. Stearns, et al, 267 P.2d 59, 123 C.A.2d 472

THE RELATIONSHIP OF MASTER AND SERVANT BETWEEN JAMES IRVINE AND MYFORD IRVINE AND E. M. PRICE

The only relationship in law that existed between James Irvine, the individual, and Myford Irvine and E. M. Price during the entire period from 1917 to the date of Mr. Irvine's death on August 24, 1947, was that of

master and servant. It is therefore hornbook law that James Irvine absolutely controlled every act or deed of both Myford Irvine and E. M. Price as his servants and employees, and that each of them was under his absolute control regardless of whether he exercised said control or not. Their full time and undivided loyalty belonged to their employer James Irvine as his servants wherever he used them in connection with their duties as his employees and servants, whether in his alter egos The Irvine Company or the defendant Foundation, or in any other capacity or connection they were still his servants and were bound to him, and to no one else. Because of this exclusive master and servant relationship there was no separateness at any time during said period that identified any other status between said parties before or after the indenture of trust was signed by James Irvine on February 24, 1937, and August 24, 1947, the date of Mr. Irvine's death. Therefore regardless of whether or not the Irvine Company stock or the indenture of trust was in fact manually delivered by Mr. Irvine to Myford Irvine or E. M. Price, such delivery under the law was to said parties as the servants and employees of James Irvine and it is therefore conclusive as a matter of law that the possession of said Irvine Company stock and said indenture of trust continued to remain in Mr. Irvine's possession and under the control and dominion of Mr. Irvine. (32 Cal.Jur.2d, § 4, p. 398, § 9 p. 406-408)

All of the authorities relied upon by the said defendant Foundation and which are set forth in said defendant's brief are wholly and completely irrelevant to any of the issues involved in the plaintiff's case, particularly to the issue of the valid delivery of the Irvine Company stock or the 1937 indenture of trust.

The vital issue and question which arises in this case is: Was the Irvine trust definitely declared, and was the

subject of the trust, to wit, the Irvine Company stock, completely and entirely separated from the dominion and control of James Irvine during his lifetime?

Whether a gift is inter vivos or causa mortis, or made through the medium of a trust, it is none the less a gift and subject to the conditions which the law places upon gifts, and when a gift is made to the servants of the donor as the psuedo officers of the donor's alter ego trustee corporation, there is no distinct and absolute delivery of the trust property which legally constitutes a relinquishment of all dominion and control over the trust property by the donor. Even where there is a bona fide trustee involved it is necessary in order to constitute a valid gift in trust that the transfer must be consummated and not remain incomplete, or left in mere intention, and this is so whether the gift is by delivery only, or by the creation of a trust in a third person. Enough must be done to pass the title. The acts of the settlor in a true trust must be of that character which will admit of no other interpretation than that there has been a complete relinquishment of all dominion over the trust property. The settlor must transfer the property to a real and bona fide independent trustee. An intention to give evidenced by a writing must be satisfactorily established yet the intended gift may fail because no valid delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust, and valid, therefore, without delivery. It must be clear, then, that the writing itself, however, definite it may be in its terms, proves no more than an intention on the part of the donor to create a trust for the actual delivery of the trust property after his death. If the Irvine Company stock did not pass from under

the dominion and control of James Irvine to a bona fide third party trustee, then the 1937 indenture of trust was at best no more than an ineffectual testamentary disposition. In other words, to be a valid and actual delivery, the indenture of trust must have been actually delivered to a bona fide third party trustee and have been meant by James Irvine to be presently operative as a conveyance, i.e., there must be the intent established by the substantial evidence that James Irvine divested himself of the title to the Irvine Company stock on February 24, 1937 when the indenture of trust was allegedly signed by him. Even if the indenture of trust was in fact manually delivered, as claimed by the defendant Foundation, there is no contradiction or conflict in the evidence but that the alleged delivery was made to either Myford Irvine or E. M. Price, who were then and there the servants and employees of James Irvine. The substantial evidence further established that said alleged delivery was to E. M. Price as the employee and servant of Mr. Irvine, and that thereupon the Irvine Company stock was placed by her in the safe that was in the office of her employer James Irvine. (Exhibits A-15, A-17. Tr. 1857). *Whitehead v. Bishop,* 23 Ohio App. 315, 318, 155 N.E. 565.

This is the evidence that was put in the record by the defendant Foundation through the documents that came from the files and records of said defendant and from its witness Mr. Gerdes. (Tr. 1816-1822, incl.) Under these circumstances there is no basis whatever to support the contention of the defendant Foundation that either the Irvine Company stock or the indenture of trust was ever actually or legally delivered at any time during the lifetime of Mr. Irvine to a valid trustee that had a definite existence that was separate from James Irvine, the individual, or his servants who were controlled by him and whose acts and deeds were his own acts and deeds, and whose alleged possession of the Irvine Com-

pany stock and the indenture of trust was the possession of their master and employer James Irvine. There is absolutely no escape possible from this conclusion as a matter of law. There is no evidence in the record in this case that will support any other conclusion or that will change the law that is applicable to the relationship of master and servant which existed between James Irvine, the master, and his servants Myford Irvine and E. M. Price. It will be recalled that this colorable transfer of the Irvine stock was based upon the plan which was conceived by James Irvine and his attorneys in connection with the preparation of the indenture of trust and the incorporation of the defendant Foundation. This plan was that the objective of all of the matters involved would be upon a basis that would enable James Irvine to exercise the full and complete control and dominion over the Irvine Company stock and the Irvine Foundation and The Irvine Company during his entire lifetime. This statement is confirmed by the evidence that was introduced by the defendant Foundation, to wit, Exhibit A-16, a letter dated June 12, 1936 from W. H. Spaulding, the attorney, to James Irvine, wherein Mr. Spaulding states to Mr. Irvine that under the provisions of the indenture of trust the Irvine Foundation "will hold these securities (Irvine Company stock) after your death". All of the substantial evidence that was introduced at the trial established that it was the intent of Mr. Irvine that the title to the Irvine Company stock was not to vest in the defendant Foundation, as trustee, until after he was dead. This manifestation of Mr. Irvine's post mortem intent is emphasized in every letter that passed between Mr. Irvine's attorneys and Mr. Irvine during the year 1936, as established by the copies of said letters which were introduced in evidence by the defendant Foundation. In said defendant Foundation's Exhibit A-15, a letter from Mr. Spaulding to James Irvine,

dated May 25, 1936, the post mortem intent involving the colorable transfer of the Irvine Company stock to E. M. Price, the employee and servant of Mr. Irvine, is clearly set forth where Mr. Spaulding states: "The fact is, however, that with a depositary,*** the trustee will, in fact, have little to do". The substantial evidence in the case is without conflict and conclusively established that the defendant Foundation, as the fiction trustee, not only had little, but actually no legal trustee status whatever and had nothing to do during the lifetime of Mr. Irvine. There was no administration of the purported trust until after the death of Mr. Irvine. Again, in the defendant Foundation's Exhibit A-17, a letter from Attorney Scarborough to Attorney Spaulding, the plan for the colorable transfer of the Irvine Company stock is again referred to as follows:

> ". . . and the suggestion is made that the certificates of stock (Irvine Company stock), remain in Mr. Irvine's name, but that they be endorsed by him and delivered to Miss Price, as the secretary of the Foundation, and by her kept in the safe at Mr. Irvine's office in San Francisco, which will also be the office of the Foundation."

As hereinbefore referred to, Exhibit A-15, the letter from Mr. Spaulding to James Irvine disclosed that during Mr. Irvine's lifetime, with the Irvine Company stock being lodged with a depositary, the trustee "will, in fact have little to do". Obviously, the word "depositary" referred to the custodian of the Irvine Company stock, who was to be Miss Price and who would hold the stock as such depositary in Mr. Irvine's safe that was located in Mr. Irvine's office during the lifetime of Mr. Irvine.

JAMES IRVINE DIED INTESTATE AS TO THE 459 SHARES OF IRVINE COMPANY STOCK

The testimony of Mr. Gerdes which is set forth in the appendix to the brief for appellant is supplemented in the reply brief for appellant to include Mr. Gerdes testimony which disclosed the conversation he had with Mr. Irvine at the time of the preparation and execution of Mr. Irvine's will.

The testimony of Mr. McLaren, which is also set forth in the appendix to the brief for appellant, is supplemented to include Mr. McLaren's testimony which includes his conversation with Mr. Irvine with reference to the additional five shares of Irvine Company stock which Mr. Irvine purportedly added to the 505 shares of Irvine Company stock.

The testimony of both Mr. Gerdes and Mr. McLaren with Mr. Irvine, at the time he executed his last will and testament on May 14, 1946, disclosed in detail the testamentary plan which he intended would apply to the disposition of his entire estate, and that he therefore not only disposed of that part of the assets of his estate which passed under his will but he also had in mind and intended that none of the 510 shares of Irvine Company stock that were purportedly disposed of in the indenture of trust signed by Mr. Irvine on February 24, 1937, would ever be a part of his testamentary trust. Mr. Irvine's intention that the 510 shares of Irvine Company stock which is described in said indenture of trust was not to be included at any time under the trust provisions of his last will and testament and as set forth in Article Fifth of said will, is substantiated by Mr. Sawyer in his testimony with reference to the conversation that he allegedly had with Mr. Irvine on or about June 21, 1946. (Tr. 447-489, incl.)

This conversation which allegedly took place between Mr. Sawyer and Mr. Irvine and Miss Price, his secretary, was subsequent to May 14, 1946, which is the date that Mr. Irvine executed his will, and the purpose of the discussion with Mr. Irvine, according to the testimony of Mr. Sawyer was that Mr. Irvine wanted to know if the fact that the 510 shares of Irvine Company stock had not been transferred on the books of The Irvine Company to The James Irvine Foundation would affect the validity of the indenture of trust. Mr. Sawyer not only wrote a letter to Mr. Irvine with reference to his opinion that said failure to transfer the Irvine Company stock on the books of The Irvine Company would have no bearing on the validity of said indenture of trust, but Mr. Sawyer also wrote in a letter to Mr. Gerdes that in his opinion it would be advisable to include in Mr. Irvine's will a contest clause which would disinherit any beneficiary named in said Irvine will who might contest the validity of said 1937 indenture of trust. (Ex. A-58)

It is therefore conclusive that not only at the time Mr. Irvine executed his will on May 14, 1946, as well as thereafter up until the date of his death, James Irvine fully intended that the 510 shares of Irvine Company stock would be disposed of as planned by him under the 1937 indenture of trust entirely separate, independent and apart from that portion of his estate which passed under the trust provisions of his will. It further appeared conclusively that Mr. Irvine intended that in the event the trust created by the 1937 indenture of trust failed, the 510 shares of Irvine Company stock would not be included in his testamentary estate and under the trust provisions of his said will.

Mr. Irvine's will does not contain a general residuary clause. Article Fifth of the will of James Irvine is a specific residuary clause and not a general residuary

clause. If there is any general residuary clause at all in Mr. Irvine's will it is paragraph F, subparagraph 2 of article Fifth, which provides that if any after-acquired property is received by the testamentary trustees subsequent to distribution of Mr. Irvine's trust estate to said trustees, such after-acquired property shall be distributed share-and-share alike to the heirs of James Irvine.

The testamentary plan of Mr. Irvine having been established through the evidence introduced by the defendant Foundation by the testimony of said defendant witnesses Gerdes, McLaren and Sawyer, the conclusion that Mr. Irvine died intestate is inevitable insofar as the 510 shares of Irvine Company stock is concerned.

It is further stated in the brief for appellant that the 459 shares of Irvine Company stock which are held by the defendant Foundation on a resulting trust for the heirs of James Irvine, should be distributed in the proportion of one-third thereof to the plaintiff, one-third to Kathryn Lillard Wheeler, and the remaining one-third to Linda Irvine Gaede and James Myford Irvine. However, it appears from the brief of Kathryn Lillard Wheeler filed in this appeal that she has confirmed her renunciation of any interest in said 459 shares of Irvine Company stock as originally stated by her as a witness at the trial. (Tr. 3506-3546, incl.) Therefore the plaintiff requests that the judgment of this court for the distribution of said 459 shares of Irvine Company stock provide as follows: one-half (½) thereof or 229½ shares to plaintiff, and the remaining one-half (½) thereof or 229½ shares to Linda Irvine Gaede and James Myford Irvine.

There is set forth in the appendix to plaintiff's reply brief an excerpt from *Estate of Smith,* 64 Cal.Rptr. 295-297, incl. which supports the contention of the plaintiff

that Mr. Irvine died intestate as to the 510 shares of Irvine Company stock and that it was his testamentary plan that no part of said Irvine Company stock would ever become a part of the testamentary trust provisions which are contained in his last will and testament.

See also the following cases:

Estate of Bailess, 51 Cal.Rptr. 850, 249 A.C.A. 1088

Estate of Barnes, 47 Cal.Rptr. 480, 407 P.2d 656

Estate of Barnhart, 37 Cal.Rptr. 909, 226 C.A.2d 289

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Deacon's Estate, In re, 342 P.2d 261, 172 C.A.2d 319

Hoytema's Estate, 180 Cal.430, 181 P. 645

Klewer's Estate, 268 P.2d 547, 124 C.A.2d 219

Kuttler, Estate of, 160 C.A.2d 332, 325 P.2d 624

Maxwell's Estate, 158 C.A.2d 544, 322 P.2d 1018

Smith, Estate of, 64 Cal.Rptr. 295

Swallow's Estate, In re, 27 Cal.Rptr. 235, 211 C.A.2d 369

It further appears from the Report of the Inheritance Tax Appraiser in the Estate of James Irvine, Deceased, that it was the testamentary plan of Mr. Irvine that each of his heirs would have received an equal amount of his bounty as of the date of his death. When Mr. Irvine died on August 24, 1947, Myford Irvine, son of the said decedent, had already received from his father 200 shares of Irvine Company stock which, as of said date had a value of $11,000. per share, or a total value of $2,200,000. Under Mr. Irvine's will Myford Irvine received a legacy of one-

eighth of Mr. Irvine's estate, which was valued by the Inheritance Tax Appraiser at $1,074.98. Myford Irvine therefore received both during his father's lifetime and under his father's will property of the total value of $3,274,098. Linda Irvine Gaede, the daughter of Myford Irvine, received a legacy under the will of James Irvine which was valued by the Inheritance Tax Appraiser at $809,922.91. It therefore appears that Myford Irvine and his daughter Linda received a total bounty from James Irvine of $4,084,020.91.

The mother of Kathryn Lillard Wheeler died in 1920, which was before James Irvine made a gift of 200 shares of Irvine Company stock to James Irvine, 3rd, the father of Athalie Anita Irvine, and also had made a gift of 200 shares of Irvine Company stock to Myford Irvine, the father of Linda Irvine Gaede. Kathryn Lillard Wheeler received a gift from James Irvine of 50 shares of Irvine Company stock in 1935 which, at $11,000. per share, had a total value of $550,000. (Exhibits 8, Tr. 3649; B-15, Tr. 2084; B-16, Tr. 1138) In 1941 Kathryn Lillard Wheeler received a further gift of certain real property in San Francisco which had a value of $385,000. (Exhibits 8, Tr. 3649; B-15, Tr. 2084; B-16, Tr. 1138). Kathryn Lillard Wheeler under the will of James Irvine received the sum of $82,000. from insurance policies on the life of James Irvine, and under the will of James Irvine she received a legacy that the Inheritance Tax Appraiser valued at $1,516,364.29. (Ex. 8, Tr. 3649) Kathryn Lillard Wheeler therefore received from James Irvine during his lifetime and under his will after the date of Mr. Irvine's death, the total sum of $2,816,427.84.

Athalie Anita Irvine, the daughter of James Irvine, 3rd, upon Mr. Irvine's death received 200 shares of Irvine Company stock under a trust agreement between her father and James Irvine, which terminated upon the

death of James Irvine. The Inheritance Tax Appraiser valued the said 200 shares of Irvine Company stock as of the date of death of Mr. Irvine, at $2,200,000.

Athalie Anita Irvine received a legacy under the will of James Irvine which the Inheritance Tax Appraiser valued at $427,688.96. It therefore appears that Athalie Anita Irvine received from James Irvine a total bounty of $2,627,688.96 or substantially less than was received by Myford Irvine and Linda Irvine Gaede, as well as the amount that was received by Kathryn Lillard Wheeler.

It would therefore be contrary to the testamentary plan of James Irvine if the 459 shares of Irvine Company stock were to be distributed to the surviving heirs of Kathryn A. Lilliard, the mother of Kathryn Lillard Wheeler, to Linda Irvine Gaede, the daughter of Myford Irvine, and to Athalie Anita Irvine, the daughter of James Irvine, 3rd, on the basis of the percentages bequeathed to each of said heirs in the last will and testament of James Irvine, to wit, Kathryn Lillard Wheeler, 4/8ths; Linda Irvine Gaede, 2/8ths; and the plaintiff, 1/8th.

THE IRVINE TRUST IS ILLEGAL AND VOID BECAUSE IT IS AGAINST PUBLIC POLICY AND IS IN VIOLATION OF THE POLICY ESTABLISHED BY SECTION 41 OF THE PROBATE CODE OF CALIFORNIA, AND IS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The purported trust created by the 1937 indenture of trust is against public policy and is therefore illegal and void. Section 62, Restatement of the Law — Trusts, 2d, provides as follows:

> "A trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision

would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee."

Under the provisions of the 1937 indenture of trust the defendant Foundation illegally holds the legal title to 459 shares of Irvine Company stock which amounts to 53 per cent of the total outstanding stock of said corporation. This majority stock holding by said defendant Foundation illegally vests in said defendant the control of the board of directors and the management and destiny of The Irvine Company. Under this illegal control said defendant Foundation for the past 20 years has placed the 47 per cent financial interest of the plaintiff and the other minority stockholders in The Irvine Company in great peril and jeopardy. This control of a private independent corporation whose business is entirely unrelated to the pseudo charitable activities of a gimmick tax-exempt private foundation such as The James Irvine Foundation has been declared by the United States Treasury Department to be contrary to public policy. On February 2, 1965, the Secretary of the Treasury issued a report on private foundations in the United States and submitted the same to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the United States Senate of the Eighty-ninth Congress, and said report makes definite recommendations to both of said Congressional committees for the immediate adoption of legislation that will prevent private foundations such as the defendant Foundation from holding, either directly or indirectly, or through stock holdings, 20 per cent or more of a private corporation such as The Irvine Company whose business is unrelated to the charitable activities of the foundation.

Under this declaration of public policy and recommendation of the Treasury Department, the holding by

the defendant Foundation of 53 per cent of the stock control of The Irvine Company of which the plaintiff is the largest individual stockholder through her ownership of 21 per cent of the total outstanding stock, is illegal and void as being contrary to the best interests of the United States government as a matter of public policy.

The plaintiff requests the Court to take judicial notice of said Treasury Department Report on Private Foundations issued on February 2, 1965, and submitted to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the United States Senate, Eighty-ninth Congress, particularly the following that is contained on page 7 of said report:

> "C. FOUNDATION INVOLVEMENT IN BUSINESS
>
> "Many private foundations have become deeply involved in the active conduct of business enterprises. Ordinarily, the involvement takes the form of ownership of a controlling interest in one or more corporations which operate businesses; occasionally, a foundation owns and operates a business directly. Interests which do not constitute control may nonetheless be of sufficient magnitude to produce involvement in the affairs of the business.
>
> Serious difficulties result from foundation commitment to business endeavors. Regular business enterprises may suffer serious competitive disadvantage. Moreover, opportunities and temptations for subtle and varied forms of self-dealing — difficult to detect and impossible completely to proscribe — proliferate. Foundation management may be drawn from concern with charitable activities to time-consuming concentration of the affairs and problems of the commercial enterprise.

> For these reasons, the Report proposes the imposition of an absolute limit upon the participation of private foundations in active business, whether presently owned or subsequently acquired. This recommendation would prohibit a foundation from owning, either directly or through stock holdings, 20 percent or more of a business unrelated to the charitable activities of the foundation (within the meaning of sec. 513). Foundations would be granted a prescribed reasonable period, subject to extension, in which to reduce their present or subsequently acquired business interests below the specified maximum limit."

The purported trust created by the 1937 indenture of trust is illegal and void in that said purported trust is contrary to the policy established by Section 41 of the Probate Code of California as an attempted testamentary disposition in violation of said Probate Code Section 41.

The plaintiff has set forth in the appendix to this brief Section 41 of the Probate Code of California, and also Section 362.6, pages 2836-2937, inclusive, of Scott on Trusts, Third Edition. The issue of law which is here raised by the plaintiff has never been decided by the Supreme Court of the State of California. The only cases which are cited which have come to the attention of the plaintiff, neither of which has any application to a similar legal situation that is involved in this appeal, are the cases of *Bowdoin College v. Merritt,* 74 F.48, and *Rutherford v. Ott,* 37 C.A. 47, 173 P. 490. The federal case is a decision that was rendered in 1896 by the United States District Court for the Northern District of California, and the California State case was decided by the District Court of Appeal and never reached the Supreme Court of California.

Section 101 of the Revenue Act of 1934 and the Revenue Act of 1936 and Amendments thereto, and all regulations issued thereunder by the Commissioner of Internal Revenue are in violation of the Fifth and Fourteenth Amendments to the United States Constitution and are therefore void. The unequal and special privileges and rights which are granted to a private foundation corporation or trust to receive a 100 per cent tax exemption on its income from the trust fund where the donor also receives a 100 per cent tax deduction for the full cash value of his donation, whether in money, securities, real estate or works of art, is in violation of the rights of the plaintiff as a substantial federal income taxpayer in that the plaintiff, as a representative of a class of similar income taxpayers, is not granted equal rights or privileges but is restricted to a discriminative percentage of 30 per cent of her adjusted gross income for all charitable contributions which the plaintiff and similar income taxpayers make during any taxable year.

The 100 per cent income tax deduction allowed the donor and the 100 per cent tax exemption allowed the donee under said Revenue Acts and Amendments thereto covering the contributions made to private foundations is discriminatory and unequal to the plaintiff and all other similar United States income taxpayers.

Respectfully submitted,

Lyndol L. Young

Attorney for Plaintiff-Appellant
Athalie Irvine Smith

TESTIMONY OF ROBERT H. GERDES

Q Prior to the time that you went on the board of directors of The Foundation did you have any discussion with Mr. Irvine about that appointment?

A Yes. He asked me if I would be willing to serve as a director, a member and director, of The Irvine Foundation. Prior to that time he told me that he wanted to become interested in the affairs, in his affairs, the affairs of The Irvine Company and The Foundation, and he asked me if I would be willing to serve, and at that same time he explained to me again what his general intents were with regard to the creation of The Foundation.

Q In substance, what did he tell you about what his intents were with respect to The Foundation?

A Well, he said that he thought he had been quite generous with members of his family and that he wanted to create a charitable trust for the benefit of worthy and needy people in the state and he felt that the state had been very good to him in that he had accumulated considerable property and wealth and he wanted to return some of this.

He also said that he thought it was important to have the control, or at least the majority of the members of The Foundation, which owned a majority of the stock of The Irvine Company, he wanted a majority of those directors to be men outside the family, who had had business experience, and he said that he had observed that other families that had accumulated considerable wealth frequently had extensive litigation and that it often tied up the operations of their properties; and so he thought it very important that they have outside individuals who could exercise their independent judgment and who would judge matters dispassionately as far as

the family was concerned; and for that reason he said that he would like me to serve.

Q You then accepted an appointment as a member and director of The James Irvine Foundation?

A I did.

Q And you continued from that time forward until this as a member and director of that corporation?

A I have.

Q Did you prepare Mr. Irvine's will?

A Yes.

Q I show you a copy of the document that has been marked for identification as Defendants' Exhibit B, and I will ask you if you can identify this copy as the document to which reference has been made.

A Well, it looks like the will that was admitted to probate, without comparing every page.

Q What was the date of execution of the will, Mr. Gerdes?

A May 14, 1946.

Q Approximately how long was this will in the course of preparation between you and Mr. Irvine?

A I have no definite recollection, but I have — my impression is that it was a matter of a few weeks where he was giving me information and I would give him a draft and he would look at it and make suggestions.

Q In connection with the preparation of the will, did you discuss with Mr. Irvine his various property affairs as of that time?

A Yes, he discussed some of them with me.

Q Did he discuss specifically with you anything to do with stock of The Irvine Company?

A Yes. He said that he had given his son Myford — which of course I knew by that time — 200 shares; that he had given, that 200 additional shares were given in trust for his son then deceased, James Irvine, which was under a trust; that he had given 50 shares, as I recall it, to Kate Wheeler, and 40 shares too, as I recall it, under a trust created for the benefit of his then wife.

Q Was that Mrs. Katharine Brown Irvine?

A Yes. And he also said that he had only five shares left and that he desired and intended to give that to The Foundation and also at the same time that he intended to revoke the trust insofar as it applied to The Moraga Company stock.

Q All right. Did you have any discussion about the matter of the initial 505 shares that had been transferred by the Indenture of Trust that you alluded to earlier?

A Yes. He said that — which he had already told me — that he had made a gift of that stock to The Foundation in 1937.

Q You knew that already at the time that you were preparing the will?

A Yes. He told me that a number of times before.

Q Subsequently did you become aware of Mr. Irvine carrying out this intended plan he told you about of transferring his remaining five shares in The Irvine Company stock to The Foundation?

A Subsequently he did that.

MR. PRIVETT: I am referring to Exhibit A-14, Mr. Young.

MR. YOUNG: Okay.

MR. PRIVETT: I will be referring to page 106 of Exhibit A-14, which are the minutes of the regular meeting of the directors of The James Irvine Foundation on Wednesday, June 26, 1946 at 2:30 p.m.

Q Mr. Gerdes, I will ask you to look at pages 106 and 107 of these minutes, and particularly the information beginning at about the middle of that page. Would you review that please and tell me if you can — Review it first.

A Well, as a matter of fact I have recently read these minutes and I am somewhat familiar with the content.

Q The minutes contain in full a letter dated June 20, 1946, from Mr. Irvine to The Foundation, commencing at about the middle of page 107, do they not, Mr. Gerdes?

A These are the minutes that have to do with the original — the acceptance by The Foundation of the — no. Yes. These are the minutes that have to do with regard to the gift of the five shares of Irvine Company stock to The Foundation and the withdrawal of the 12,750 shares of The Moraga Company stock from that trust.

Q Were you present at that meeting at which this letter was presented?

A Yes.

Q And do you recall the presentation of this letter to the directors at that meeting?

A Yes, because it was the custom of Mr. Irvine, in cases of all these foundations, he would sit in the chair as president and —

Q Do you mean Mr. Myford —

A Myford Irvine — and read the letter from Mr. Irvine.

Q Is the action that is reflected on the succeeding page or pages of the minutes with respect to that gift, being the resolutions of the directors — do the minutes correctly reflect the action taken at the meeting?

A These minutes reflect the actions taken by the directors of The Foundation at that meeting, as far as I can recall them.

Q Thank you. You attended the meetings during the period of time you went on the board up until the time of Mr. Irvine's death, did you not, Mr. Gerdes?

A Of The Foundation?

Q Yes.

A I don't recall whether I attended all of them. I attended some of them.

Q Was Mr. James Irvine himself ever in attendance at any of the meetings you attended during his lifetime?

A My best recollection is that he attended one or two of those meetings, but it is not too clear in my mind because I attended quite a number of meetings in his office at which he was there and more or less the same people were sitting around, and it is not clear in my mind whether he was or was not there at that time; but my impression is he was at some of them.

Q At or about the time that you were engaged in the preparation of Mr. Irvine's will did Mr. Irvine discuss with you any question related to the manner in which he had made transfer of the stock of The Irvine Company to The Foundation?

A Well, he told me that he had made this gift, that he had endorsed the stock in blank and delivered it to The Foundation, to Mr. Myford Irvine and Miss Price, as I recall it.

Q Did he ever ask you whether in your legal opinion that was a valid manner of transferring the title of the stock to The Foundation?

A Yes, he did at — I believe it was after the will was executed.

Q Whenever it occurred, whether it was before or after, what did he ask you with regard to the validity of the manner of transferring?

A Well, he asked, he told me that he had endorsed it in blank and delivered the stock to The Foundation; as I say, to Mr. Myford Irvine and Miss Price. He told me also that he had had the stock transferred on the books of the corporation because he wanted to and did receive the dividends during his lifetime and voted the stock.

MR. PRIVETT: I am referring now, Mr. Young, to Exhibit A-56 in evidence.

Q I show you a letter dated June 22, 1946, Mr. Gerdes, which is a letter that has been put in evidence, written by Mr. Kent Sawyer to Mr. James Irvine, showing copy to Robert H. Gerdes, and ask you if you will identify that letter as one that you did receive.

A Yes, I received a copy, I recall receiving a copy of this opinion written, I believe, by Mr. Sawyer of that law firm of Hall, Henry & Oliver.

Q Can you recall the context of the circumstances under which you received a copy of this letter, why it came to you?

A Mr. Irvine, either before or after the making of his will, and I think it was after but I am not sure, asked whether I thought the fact that the stock had not been transferred of record had any effect on the completion of that as a gift; and I told him that on the basis of my

understanding of the law — and I had had occasion to go into this subject during my practice in general — I told him that I didn't think the transfer on the books of the company was necessary, that I hadn't looked it up the last several years, and I thought it would be wise to have it fixed up.

I told him right at that time I was quite busy, and suggested that he then ask the Hall firm to give him an opinion on the subject, and I assume that is why I received a copy of this letter.

Q All right. I show you a copy of Exhibit A-57 in evidence, which is a letter on the letterhead again of Hall, Henry & Oliver, dated July 9, 1946, addressed to Mr. James Irvine, which is a letter that was prepared and sent by Mr. Kent Sawyer again, and it shows copy to Robert H. Gerdes, Esq.

A Yes. I remember receiving that.

Q I show you now Exhibit A-58 in evidence which again is a letter on the letterhead of Hall, Henry & Oliver, dated August 26, 1946 and this letter is addressed to Robert H. Gerdes, Pacific Gas and Electric Company, and it says, "Re The James Irvine Foundation," and it is signed Kent A. Sawyer, and ask you if you can identify that as a letter which you received shortly after the date that it bears?

A Yes. I remember receiving this letter.

Q The subject of that letter appears, Mr. Gerdes, to be an inquiry regarding the applicability of certain sections of the California Probate Code to Mr. Irvine's gift of stock of The Irvine Company to The Foundation. Do you recall the circumstances under which that letter was sent to you?

A Well, I asked Mr. Sawyer for his opinion, and that is why it was sent.

Q Do you recall what it was or anything about why you were prompted to make an inquiry about these particular code sections?

A I can't remember whether Mr. Irvine made an inquiry or whether I did it on my own.

Q Will you refer to the past paragraph of that letter.

A Yes.

Q There is in this paragraph a suggestion, it reads as follows, the last paragraph:

> "The only thing that occurs to me (apart from the necessity of following California legislation and decisions, with the provisions of this instrument in mind) is that a possible reference might be made to the trust and the will which would have the effect of inhibiting a contest of the trust by a beneficiary of the will who might otherwise, in view of the magnitude of the properties and relatively trifling expense, be tempted to litigate the issue despite the holdings of the California courts.
>
> "I shall be glad to discuss this question with you further."

Do you recall any subsequent discussion that you had or may have had with Mr. Irvine with respect to this?

A Yes. Some time after I received this letter, we talked of a number of things, and I called this matter to his attention and he said, "Well," he said, "we have an opinion that it is valid, that the transfer as it was made in 1937 is valid and requires nothing further." He says, "You have that opinion." He said, "I see no reason

now why we need to do anything further," and I believe I later told Mr. Sawyer that when he asked me.

Q Now, from the time of this discussion you have just identified concerning the gift of stock that Mr. Irvine had made to The Foundation, do you recall any other consultation or conversation with Mr. Irvine on this subject, from this time in 1946 until his death on August 24, 1947?

A I have no recollection of any such discussion.

Q In Mr. Irvine's will he designated certain people to be executors and trustees of the trust established under that will, did he not, Mr. Gerdes?

A Correct.

Q And the people named to be the executors were Myford Irvine, his son, Katharine Brown Irvine, his wife, and yourself, were they not?

A Initially, yes.

Q And then, in addition he named certain people who were to serve as substitute executors and trustees and specified the order, if substitutes were to be appointed, in which these persons named should be appointed?

A That is correct.

Q And this first such person named as a substitute was Miss E. M. Price, was it not?

A Yes.

Q And had you known Miss Price over the years?

A Yes. She was in the office of Mr. Irvine and acted as secretary and handled many of the details of his affairs, and I knew her almost from the time that I knew Mr. Irvine or maybe even before.

Q In addition, she was the Secretary and Treasurer of The James Irvine Foundation from that period of time at all times until her death in 1959, was she not?

A Yes.

Q The next substitute of an executor or trustee to be appointed in case one was appointed named in the will was Mr. Loyall McLaren?

A Yes.

Q Had you known Mr. McLaren prior to the time of Mr. Irvine's death?

A Well, I knew him, but it is not clear in my mind exactly the date when I became quite — came to know him quite well; but I knew him.

Q And at the time of Mr. Irvine's death, you were appointed along with Myford Irvine and Katharine Brown Irvine as an executor of Mr. Irvine's estate, were you not?

A Yes.

Q And you served from that period in September 1947, when that appointment was made, until his estate was closed by the entry of the decree of final distribution in December of 1952?

A That is correct.

Q During that period, just so we have the outline of the examination about this period, Katharine Brown Irvine died in April of 1950. Do you recall that, Mr. Gerdes?

A I know she died about that time. I don't know the exact date.

Q And then was the first named substitute in the will appointed to succeed her as executor of the estate?

A Yes.

Q Now, who did you employ as your counsel to represent you as an executor of the estate of Mr. Irvine?

A Well, after a conference with Myford Irvine, one of my co-executors, we determined to appoint Chaffee Hall, and we did.

Q And was there some other lawyer that was appointed to represent Katharine Brown Irvine?

A Well, Mrs. Irvine, we talked to her and she said she would like to have as her attorney Mr. Wheeler, we call him Todd Wheeler, I have forgotten what is — Charles —

Q — S. Wheeler, Jr.?

TESTIMONY OF N. LOYALL McLAREN

Q Mr. McLaren, I am going to hand you the original copy of the exhibit that has been marked as Exhibit A-13, a letter from James Irvine to The James Irvine Foundation, dated June 20, 1946. At the top, 820 Crocker Building, San Francisco, California. It bears a signature of James Irvine. Then at the bottom of the further writing it bears the name The James Irvine Foundation by Myford Irvine, President, and it bears the signature of Myford Irvine.

Would you examine that, please?

(Brief pause.)

A I have examined it.

By MR. PRIVETT:

Q Prior to the date of this letter, June 20, 1946, did you have any discussions with Mr. Irvine with respect to

any changes in the property held by The Foundation under the terms of the indenture of trust?

A I did.

Q Will you tell us, please, what was discussed between you and Mr. Irvine in that regard.

A Mr. Irvine told me that he only had left five shares of the stock of The Irvine Company, and that by adding this holding to the shares already owned by The Foundation, that it would bring the total holding up to 51 percent, which would clearly establish control, and might at some time have an effect on cumulative voting and matters of that kind.

He also said that he had given considerable thought to The Moraga stock held by The Foundation, and that his main interest all along, having been the matters affecting The Irvine Company and the holding of The Irvine Company stock by The Foundation, that he thought it would be a wise thing to do to withdraw that stock from The Foundation, and to that extent increase the inheritance of his heirs.

He asked me whether or not either of those two steps would in my opinion have any adverse tax effects.

I told him no, which was followed a short time later by this letter of June 20, 1946, addressed to The James Irvine Foundation.

Q Would you look to the minutes, the original minutes that you have before you. Just retain that letter there for a moment, Mr. McLaren, and look to the minutes. I will give you the page number. It is page No. 107.

A Yes.

Q These are the minutes beginning at page 106, the regular meeting of the directors of The James Irvine

Foundation, held on Wednesday, June 26, 1946 at 2:30 P.M. in room 820, Crocker Building, San Francisco.

Were you in attendance at this meeting, Mr. McLaren?

A I was.

Q Will you refer now to the page 107, about the middle of the page. There appears to be in type the letter that you have just alluded to. Can you tell me if that letter was read to the directors of The Foundation or otherwise presented to them during the course of that meeting?

A The letter was read to them.

Q Turning now over to page 109, where it says just down from the end of the first paragraph in parenthesis "Continued from page 108." Do you find that, Mr. McLaren?

A I do.

Q It says:

> "The president advised that he accepted the five shares of stock of The Irvine Company as an addition to the trust property referred to in said instrument dated June 20, 1946, and returned to Mr. James Irvine the 12,750 shares of stock of The Moraga Company which had been withdrawn from said trust. After discussion of the matter upon motion duly made and seconded the following resolution was unanimously adopted. Resolved that the said five shares of stock of The Irvine Company be and they are hereby accepted as in addition to the trust property provided for in that certain indenture of trust dated the 24th day of February, 1937 wherein James Irvine as trustor and this corporation as trustee, and the acts of the president accepting said shares of stock be

and the same is hereby ratified, confirmed and approved as the act and deed of this corporation."

Does that truly reflect, Mr. McLaren, the action that was taken at the meeting of the directors of The James Irvine Foundation held on June 26, 1946?

A It does.

Q In the resolution immediately following that is a resolution which ratifies, confirms and approves the act of the president in returning the 12,750 shares of stock of The Moraga Company to James Irvine. Is that a resolution which was also acted upon at this meeting?

A It is.

SECTION 41, PROBATE CODE OF CALIFORNIA

§ 41. Charitable and benevolent devises and bequests; restrictions

No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the

aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will. (Stats.1931, c. 281, p. 589 § 41, as amended Stats.1937, c. 480, p. 1435, § 1; Stats.1943, c. 305, p.1296, § 1.)

In re Estate of Smith, 64 Cal.Rptr. 295,

> "The trial court nevertheless concluded that the expression, "my personal belonging," was ambiguous as to what belongings were meant. Extrinsic evidence was received, showing that the formal will was carefully coordinated with the *inter vivos* trust held by respondent bank. That trust had been amended by testatrix after the date of the codicil so as to indicate that she continued to regard the trust and the formal will as constituting an integrated and complete estate plan. Such an understanding on her part would have been utterly inconsistent with the intention, now attributed to her by appellant, to give appellant by means of a codicil

a general power of appointment covering the entire residue of the estate."

2836 "SCOTT ON TRUSTS § 362.6

"In England under the Georgian Statute of Mortmain it was expressly provided that no land should be given in trust except by deed sealed and delivered in the presence of two or more witnesses at least twelve months before the death of the donor, and 'unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.' It is clear that this statute forbade not only devises for charitable purposes but also dispositions inter vivos where the settlor reserved either a beneficial life interest or a power of revocation.

"In the United States the statutes in jurisdictions in which restrictions upon the creation of charitable trusts are imposed are not so clear. As we have seen, these statutes provide either that no devise or bequest for a charitable purpose shall be good if the will is executed within a certain time before the death of the testator, or that the testator can devise or bequeath for charitable purposes not more than a half or a third of his estate. The question then is whether these statutes are applicable where a trust is created inter vivos for charitable purposes, and the settlor reserves a life estate and a power of revocation or modification. The question is whether such a disposition is so far testamentary as to fall within these restrictive statutes. It is held that it does not.

In *City Bank Farmers Trust Co. v. Charity Organization Society* the settlor executed a trust indenture transferring property to a trust company in trust to pay the income to himself for life and on his death to certain charitable organizations. He reserved power to revoke the trust and provided that the trustee should not make investments except with his consent. He died without having revoked the trust. After his death his daughter sought to set aside the trust, contending that it was invalid on the ground that it was a testamentary disposition and the trust instrument was not executed in accordance with the requirements of the Statute of Wills, and that it was in violation of the Decedent Estate Law, § 17, which provided that no person leaving a husband, wife, child or parent should devise or bequeath for charitable purposes more than one half of his estate, and that the disposition was made fraudulently for the purpose of evading the statute. The court held that the trust was valid.

"The question is at least open to argument. If the settlor can create a living trust under which the property is ultimately to go to charity, but he reserves the same potential control which he would have if the disposition were made by will, it is arguable that the purpose of the statute is defeated. Where a settlor creates a trust inter vivos and reserves a power or revocation, it is possible for him to enjoy the property if he so wishes at any time as long as he lives, and the persons who are to take the beneficial interest on his death are in a precarious position until he dies, since they may be deprived by the exercise of the power of revocation of all interest under the trust. In substance the situation is not very different from that which arises where

the owner of property has made a will. Even though a revocable trust created inter vivos has some of the aspects of a testamentary disposition, yet the courts have wisely refused to hold such trusts invalid merely because they are not executed with the formalities of a will. The purpose of the Statute of Wills is to prevent fraudulent claims, but in the case of a trust created inter vivos there is no more danger of fraud where a power of revocation is reserved than where the trust is irrevocable. Different considerations enter in, however, where a settlor attempts to do by means of a revocable trust created inter vivos what he could not do by will. The policy underlying the restriction on dispositions by will may well be held to be equally applicable to revocable trusts created inter vivos. In states in which there is a policy forbidding a testamentary disposition in favor of charitable purposes of more than a certain proportion of a man's estate, it may be contended that the policy is applicable to dispositions inter vivos where the settlor reserves a power of revocation. A similar problem arises, as we have seen, with respect to the statutory rights of a surviving spouse in the estate of a deceased spouse. The courts, however, have generally held that these statutes impose no restrictions upon the creation of a trust inter vivos, even though the settlor reserves a life interest and a power of revocation.

"The question may arise whether these statutes restricting charitable dispositions by will are applicable where a settlor creates a trust for himself for life and on his death as he may appoint by will. We have seen that where a power of appointment is given to another person, it has been held that the exercise of the power does not fall within the statu-

tory restriction. It may be different, however, where a power of appointment is reserved by the settlor. In such a case it would seem that the policy of the statute is applicable."